Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

ISAIAS SOLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether Mr. Soler entered his guilty plea voluntarily when he pled guilty to a crime that mandated a term of life imprisonment when he was not facing the death penalty and had nothing to lose by going to trial?

2) Whether Mr. Soler received effective assistance of counsel when he pled guilty to a crime that mandated a term of life imprisonment?

PARTIES TO THE PROCEEDING

The Petitioner is Isaias Soler.

The Respondent is the United States of America.

The other Defendants in the United States Court of Appeals for the Second Circuit were Frank Estrada, Nelson Carrasquillo, Felix DeJesus, Charles DeJesus, Eddie Lawhorn, Yamarr Shipman, Michael Hillard, Pablito Cotto, Benito Rosario, Ricardo Rosario, Jermaine Jenkins, Makene Jacobs, Joseph Butler, Viviana Jiminez, Kelvin Vereen, Daniel Herredia, Felipe Santana, Tamarius Maner, Gloria Vargas.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional and/or Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	5
I. The Second Circuit Erred In Affirming The District Court's Denial Of Mr. Soler's Motion To Vacate His Guilty Plea Because Mr. Soler Did Not Understand The Consequences Of His Change Of Plea	5
II. The Second Circuit Erred In Affirming The District Court's Denial Of Mr. Soler's Motion To Vacate His Guilty Plea Because Mr. Soler Did Not Receive Reasonably Effective Assistance Of Counsel	8
a. It Was Per Se Ineffective Assistance Of Counsel To Recommend That Mr. Soler Plead Guilty To A Crime That Carried A Mandatory Term Of Life Imprisonment When He Did Not Face The Death Penalty	9

TABLE OF CONTENTS – Continued

Page

b. Mr. Soler Received Ineffective Assistance Of Counsel Because He Was Unaware Of The Consequences Of Pleading Guilty To The Mandatory Life Sentence Without A Cooperation Agreement Secured 10

Conclusion 11

TABLE OF AUTHORITIES

Page

CASES

Downs-Morgan v. United States, 765 F.2d 1534 (11th Cir. 1985) 8

Hill v. Lockhart, 474 U.S. 52 (1985) 9

Kercheval v. United States, 274 U.S. 220 (1927) 6, 7, 10

Strickland v. Washington, 466 U.S. 668 (1984) 9

United States v. Couto, 311 F.3d 179 (2d Cir. 2002) ... 5, 8, 9

United States v. George, 869 F.2d 333 (7th Cir. 1989) 8

United States v. Russell, 686 F.2d 35 (D.C. Cir. 1982) 5, 6

Ventura v. Meachum, 957 F.2d 1048 (2d Cir. 1992) 8

RULES

Federal Rules of Criminal Procedure 11(d)(2)(B) 5

PETITION FOR A WRIT OF CERTIORARI

Petitioner Isaias Soler respectfully prays that the Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit in *United States of America v. Isaias Soler*, et al.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit in the matter, Appendix ("App.") 1, is reported at 124 Fed. Appx. 62. The opinion of the United States District Court, District of Connecticut in this matter, App. 7, is reported at 289 F.Supp.2d 210.

JURISDICTION

The United States Court of Appeals officially released its decision in this matter on March 2, 2005. App. 1. No party to the proceeding sought rehearing or reconsideration. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND/OR STATUTORY PROVISIONS INVOLVED

Federal Rules of Criminal Procedure 11(d)(2)(B) provides, in relevant part, as follows: "A defendant may withdraw a plea of guilty . . . after the court accepts the plea, but before it imposes sentence[,] if the defendant can

show a fair and just reason for requesting the withdrawal."

STATEMENT OF THE CASE

I. Introduction.

Mr. Soler pled guilty to a crime that mandated a term of life imprisonment when he was not facing the death penalty and he had nothing to lose by going to trial. Mr. Soler pled guilty on the advice of counsel because he was told that by doing so, he might receive a sentence less than life imprisonment. It is evident from the transcript of the plea canvas that Mr. Soler was confused by the illogical nature of his plea.

Furthermore, Mr. Soler's court-appointed counsel had not secured a cooperation agreement with the government at the time of Mr. Soler's guilty plea. Given that Mr. Soler was pleading guilty to a count with a mandatory life sentence, it was objectively unreasonable for his counsel to not have secured such an agreement prior to the plea.

II. Proceedings Below.

By a June 20, 2001 Third Superseding Indictment, the government charged Mr. Soler with participating in racketeering influenced corrupt organization ("RICO") in violation of 18 U.S.C. § 1962(c) (Count One), RICO conspiracy in violation of 18 U.S.C. § 1962(d) (Count Two), committing a violent crime in aid of racketeering in violation of 18 U.S.C. § 1959(a)(1) (Count Three), use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1) (Count Five), witness tampering in violation of

18 U.S.C. § 1512(b)(3) (Counts Six and Seven), conspiracy to engage in witness tampering in violation of 18 U.S.C. § 1512(b)(3) (Count Eight), and conspiracy to possess with intent to distribute more than 1000 grams of heroin and 50 grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846 (Counts Twelve and Thirteen) App. 2.

Mr. Soler began a jury trial in this case on January 7, 2002. Before the trial commenced, the government notified Mr. Soler that it would not seek the death penalty against him. App. 4.

On the third day of his trial, Mr. Soler met with his court-appointed counsel who encouraged him to plead guilty to all counts against him. While Count Three of the Third Superceding Indictment imposed a mandatory term of life imprisonment, Mr. Soler believed based on his conversations with counsel that such a sentence would not be imposed against him because he was going to cooperate with the government. At the time of his plea, however, Mr. Soler did not have a cooperation agreement with the government.[1] Mr. Soler maintains that his court-appointed counsel did not explain to him the mandatory life term imposed by Count Three.

The district court canvassed Mr. Soler about his change in plea on January 9, 2002. App. 9. During that canvas, Mr. Soler expressed concern over the mandatory life term and clearly told the court he did not understand the federal sentencing guidelines. App. 9. Mr. Soler

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[1] Mr. Soler did enter into a Proffer Agreement with the government on January 21, 2002, after his guilty plea.

subsequently pled guilty, however, misunderstanding that he would *not* receive a sentence of life imprisonment.

Subsequent to his change of plea, and after receiving new court-appointed counsel, Mr. Soler finally came to understand the ramifications of pleading guilty to Count Three of the Third Superceding Indictment. Accordingly, Mr. Soler filed a motion to vacate his guilty plea. The basis for the motion to vacate the guilty plea was a claim of ineffective assistance of counsel and a claim that Mr. Soler was not afforded the protections guaranteed by Rule 11 of the Federal Rules of Criminal Procedure. App. 9. Without conducting a hearing, the court denied Mr. Soler's request to vacate his guilty plea. App. 9.

Mr. Soler filed a timely appeal with the United States Court of Appeals for the Second Circuit, arguing that the district court erred in denying Mr. Soler's motion to withdraw his guilty plea. Mr. Soler contended on appeal that the district court erred in denying Mr. Soler's motion to vacate his guilty plea because Mr. Soler did not understand the consequences of his change of plea. Mr. Soler also contended that the district court erred in denying his motion to vacate his guilty pleas because Mr. Soler did not receive reasonably effective assistance of counsel.

The Second Circuit Court of Appeals agreed with the Respondent. The court concluded that upon review of the plea colloquy, Mr. Soler's guilty plea was knowingly and intelligently made and that the district court did not abuse its discretion in denying Mr. Soler's motion to withdraw his guilty plea on those grounds. The court further found that Mr. Soler's ineffective assistance of counsel claim was without merit. First, the court noted that because Mr. Soler's trial had already started and he was aware of the

evidence, there was a possibility that a plea of guilty at that point might facilitate his negotiating a favorable cooperation agreement. Therefore, Mr. Soler failed to show counsel's recommendation fell below an objective standard of reasonableness in that regard. Second, the court noted that Mr. Soler's contention that he did not receive effective assistance of counsel because he was unaware of the consequences of pleading guilty was belied by the record and the plea colloquy. The Second Circuit accordingly affirmed the decision of the district court. Mr. Soler seeks review of this decision.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit Erred In Affirming The District Court's Denial Of Mr. Soler's Motion To Vacate His Guilty Plea Because Mr. Soler Did Not Understand The Consequences Of His Change Of Plea.

A defendant may withdraw his guilty plea before sentencing if "the defendant can show a fair and just reason for requesting withdrawal." Federal Rules of Criminal Procedure 11(d)(2)(B) (previously Rule 32(e)). "Withdrawal of the plea is never a matter of right, but before sentencing the practice is liberal." *United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982); *United States v. Couto*, 311 F.3d 179, 185 (2d Cir. 2002) (upon a showing by a defendant that there are valid grounds for withdrawal, the motion to withdraw should be liberally granted.) A district court's denial of a motion to withdraw the plea of guilty is reviewed for abuse of discretion. *Id.* Here, the district court abused its discretion in failing to allow Mr.

Soler to withdraw his guilty plea because Mr. Soler did not fully understand the consequences of his change of plea.

It is well-settled that a guilty plea "shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." *Kercheval v. United States*, 274 U.S. 220, 223 (1927); *see also United States v. Russell*, 686 F.2d at 38 ("A plea cannot be considered voluntary if . . . the defendant is not 'fully aware of the direct consequences' of the plea."). Mr. Soler maintains that he did not fully understand the consequences of pleading guilty at the time of his change of plea. Mr. Soler's confusion as to the consequences was evident during the January 9, 2002 hearing on the change of plea.

During the hearing, the court asked Mr. Soler if he had any questions and Mr. Soler responded that he did. App. 11. The court allowed Mr. Soler some time to discuss his questions with Attorney Truebner. App. 11. Upon the conclusion of a short recess, the court asked: "Mr. Truebner, have you and Mr. Soler had sufficient time to talk through your issues?" App. 11. Attorney Truebner responded:

> We have, your Honor, and he wants to continue with his plea of guilty. I think everyone in the courtroom can appreciate how difficult it is for a 22 year old man to plead guilty to a charge carrying a mandatory life sentence, particularly when he believes there are some defenses to that charge, and suddenly he just saw the doors closing on him forever and had some second thoughts about his decision, but I think he's had an opportunity to reconsider and is prepared to continue.

App. 11. Shortly thereafter, the district court asked Mr. Soler if he was familiar with the Sentencing Guidelines. Mr. Soler responded "No" as follows:

> THE COURT: Sentencing in the federal courts is governed in two important ways. One is by what we call the sentencing guidelines, and the other is by federal laws, what we call statutes that set forth certain minimums and maximum penalties. I want to be sure that you understand both that there is the sentencing Guidelines and how generally how those Guidelines operate and, second, that you understand that there may be statutes, laws that trump that I have to follow instead of the Guidelines. Do you understand generally how that works?
>
> THE DEFENDANT: No.

App. 17. It is evident from this colloquy that Mr. Soler did not understand the Sentencing Guidelines, unlike what was reported to the Court by his trial counsel, Attorney Truebner. App. 11.

Upon timely motion, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. *Kercheval v. United States*, 274 U.S. at 224. Here, Mr. Soler was confused during his change of plea in that he did not understand the proceedings and did not understand the Sentencing Guidelines. This confusion warrants a finding that the plea of guilty was made through ignorance. *Id.* Accordingly, the district court's decision denying Mr. Soler's motion to vacate his plea should be reversed and Mr. Soler's guilty plea should be vacated.

II. The Second Circuit Erred In Affirming The District Court's Denial Of Mr. Soler's Motion To Vacate His Guilty Plea Because Mr. Soler Did Not Receive Reasonably Effective Assistance Of Counsel.

Mr. Soler pled guilty to charges requiring a mandatory life sentence, when he was not facing the death penalty and had nothing to lose by going to trial. Importantly, Mr. Soler's court-appointed counsel had not secured a cooperation agreement with the government at the time of Mr. Soler's guilty plea. Such an agreement is a necessary foundation for any possibility of avoiding life in prison. A gamble to plead guilty to a charge with a mandatory life sentence, without a cooperation agreement, is objectively unreasonable. Moreover, Mr. Soler did not understand the consequences of pleading guilty to a charge with a mandatory life sentence. Accordingly, Mr. Soler obtained ineffective assistance of counsel regarding his change of plea and his guilty plea should be vacated.

An attorney who provides a defendant with ineffective assistance of counsel "may render a guilty plea involuntary, and hence, invalid." *Ventura v. Meachum*, 957 F.2d 1048, 1058 (2d Cir. 1992). "An accused who has not received reasonably effective assistance from counsel in deciding to plead guilty cannot be bound by that plea because a plea of guilty is valid only if made intelligently and voluntarily." *United States v. Couto*, 311 F.3d at 187 (quoting *United States v. George*, 869 F.2d 333, 335-36 (7th Cir. 1989) and *Downs-Morgan v. United States*, 765 F.2d 1534, 1538 (11th Cir. 1985)).

This Court has held that a defendant's claim that his guilty plea is involuntary or unknowing due to ineffective assistance of counsel is evaluated using the framework

established in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Hill v. Lockhart*, 474 U.S. 52, 57-58 (1985). "A defendant must first establish that counsel's representation fell below an objective standard of reasonableness." *United States v. Couto*, 311 F.3d at 187. "Second, the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial." *Id.* "The question of whether a defendant's lawyer's representation violates the Sixth Amendment right to effective assistance of counsel is a mixed question of law and fact that is reviewed de novo." *Hill*, 474 U.S. at 59.

a. It Was Per Se Ineffective Assistance Of Counsel To Recommend That Mr. Soler Plead Guilty To A Crime That Carried A Mandatory Term Of Life Imprisonment When He Did Not Face The Death Penalty.

Mr. Soler had begun trial at the time when his counsel recommended that he plead guilty to all charges – charges that mandated life imprisonment. While such a plea might be logical if the government were seeking the death penalty, the government had previously stated that it was not seeking the death penalty against Mr. Soler. App. 4. At the time of the guilty plea, there was no agreement that the government would recommend a downward departure from the mandatory sentence of life imprisonment nor a cooperation agreement from which a downward departure would logically flow. App. 5. Mr. Soler maintains that it was objectively unreasonable to counsel a client to plead guilty to a charge requiring a mandatory life sentence without some negotiated agreement with the government or a real prospect of a downward departure. *See Couto*, 311

F.3d at 187. Pleading guilty to the maximum sentence without an agreement with the government was too much of a risk, and trial counsel's gamble in this case was unreasonably costly to Mr. Soler.

b. Mr. Soler Received Ineffective Assistance Of Counsel Because He Was Unaware Of The Consequences Of Pleading Guilty To The Mandatory Life Sentence Without A Cooperation Agreement Secured.

Mr. Soler maintains that had he fully known the consequences of his plea without a previously secured agreement with the government, he would not have pled guilty. Mr. Soler would have rather gone to trial because a trial provided him an opportunity to assert his defenses and avoid a lifetime in prison. Indeed, Mr. Soler had nothing to lose by trying his case to conclusion.

While Count Three of the Third Superceding Indictment imposed a mandatory term of life imprisonment, Mr. Soler believed based on his conversations with counsel that such a sentence would not be imposed against him because he was going to cooperate with the government. Trial counsel exacerbated the ineffectiveness by failing to secure a written cooperation agreement. The gamble to plead guilty without at least a cooperation agreement to charges mandating life imprisonment was an objectively unreasonable trial tactic. Had Mr. Soler received the proper advice and assistance by trial counsel, Mr. Soler would not have risked everything by pleading guilty to a charge with a mandatory term of life imprisonment. Because Mr. Soler did not receive proper advice on this issue, he did not fully understand the ramifications of the guilty plea. *Kercheval v. United States*, 274 U.S. at 223.

Therefore, the district court erred in not granting Mr. Soler's motion to vacate his guilty plea and Mr. Soler's plea should be vacated. The Second Circuit's decision should be reversed with an order that it direct the district court to vacate the guilty plea.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted,

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UNITED STATES OF AMERICA, Appellee, v ISAIAS SOLER, Defendant-Appellant. FRANK ESTRADA, NELSON CARRASQUILLO, FELIX DEJESUS, CHARLES DEJESUS, EDDIE LAWHORN, YAMARR SHIPMAN, MICHAEL HILLARD, PABLITO COTTO, BENITO ROSARIO, RICARDO ROSARIO, JERMAINE JENKINS, MAKENE JACOBS, JOSEPH BUTLER, VIVIANA JIMINEZ, KELVIN VEREEN, DANIEL HERREDIA, FELIPE SANTANA, TAMARIUS MANER, GLORIA VARGAS, Defendants.

No. 04-3603-cr

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

124 Fed. Appx. 62; 2005 U.S. App. LEXIS 3753

March 4, 2005, Decided

COUNSEL: Appearing for Appellant: CRAIG A. RAABE, Robinson & Cole LLP (Marion B. Manzo, of counsel), Hartford, CT.

Appearing for Appellee: ALEX HERNANDEZ, Assistant United States Attorney for the District of Connecticut (Kevin J. O'Connor, United States Attorney, Sandra S. Glover, Assistant United States Attorney, of counsel), New Haven, CT.

JUDGES: PRESENT: HON. JAMES L. OAKES, HON. AMALYA L. KEARSE, HON. ROBERT D. SACK, Circuit Judges.

OPINION:

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be, and it hereby is, AFFIRMED.

The defendant-appellant, Isaias Soler, pleaded guilty to: one count of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), in violation of 18 U.S.C. § 1962(c); one count of conspiring to violate RICO, in violation of 18 U.S.C. § 1962(d); one count of committing a violent crime in aid of racketeering ("VCAR") murder, in violation of 18 U.S.C. § 1959(a)(1); one count of using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1); two counts of witness tampering, in violation of 18 U.S.C. §§ 1512(b)(3) and 2; one count of conspiring to engage in witness tampering, in violation of 18 U.S.C. §§ 1512(b)(3), 2, and 371; and two counts of conspiring to possess with intent to distribute heroin and cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846. Eighteen months after pleading guilty, Soler filed a motion to vacate his guilty plea, pursuant to former Federal Rule of Criminal Procedure 32(d), now Rule 11(d)(2)(B), on the grounds that: 1) he received ineffective assistance of counsel because his attorney failed to adequately inform him of the consequences of his guilty plea – in particular, the mandatory life sentence carried by the VCAR Murder count under the Sentencing Guidelines; and 2) his guilty plea was not entered into voluntarily and intelligently because of procedural deficiencies in the plea colloquy before the district court. The district court denied Soler's motion to withdraw his guilty plea. *United States v. Soler,* 289 F.Supp.2d 210, 217 (D.Conn.2003). Soler was convicted on all counts to which he had pleaded guilty, and sentenced principally to several lifetime terms and ten-year terms of

imprisonment, with all the terms except one ten-year term to run concurrently with each other.

On appeal, Soler argues that the district court erred in denying the motion to withdraw his guilty plea because he did not understand the consequences of pleading guilty and he received constitutionally ineffective assistance of counsel.

"We review a district court's denial of a motion to withdraw a guilty plea for abuse of discretion and any findings of fact in connection with that decision for clear error." *United States v. Juncal,* 245 F.3d 166, 170-71 (2d Cir. 2001). "A defendant may withdraw a plea of guilty . . . after the court accepts the plea, but before it imposes sentence[,] if the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). Although "this standard implies that motions to withdraw prior to sentence should be liberally granted, a defendant who seeks to withdraw his plea bears the burden of satisfying the trial judge that there are valid grounds for withdrawal," *United States v. Gonzalez,* 970 F.2d 1095, 1100 (2d Cir. 1992) (internal quotation marks and citations omitted), such as the voluntariness of the plea, *see, e.g., United States v. Schmidt,* 373 F.3d 100, 103 (2d Cir. 2004); *United States v. Torres,* 129 F.3d 710, 715 (2d Cir. 1997). In this regard, a defendant's testimony at a plea allocution "carries such a strong presumption of accuracy that a district court does not, absent a substantial reason to find otherwise, abuse its discretion in discrediting later self-serving and contradictory testimony as to whether a plea was knowingly and intelligently made." *Juncal,* 245 F.3d at 171. A defendant's "change of heart prompted by his reevaluation of . . . the penalty that might

be imposed is not a sufficient reason to permit withdrawal of a plea." *Gonzalez,* 970 F.2d at 1100.

A careful review of the plea colloquy clearly indicates that the district court went to great lengths to explain how the Sentencing Guidelines worked, in conjunction with any statutes setting forth minimum and maximum penalties, and that Soler, after expressing some initial confusion, repeatedly stated that he understood. In particular, the record shows that Soler was notified on numerous occasions – both through the plea agreement, which he confirmed that he read and understood, and at several points in the plea colloquy – that he faced a mandatory life term in prison on the VCAR Murder count if he pleaded guilty. Absent the requisite "substantial reason" to discredit Soler's testimony at his plea allocution, *Juncal,* 245 F.3d at 171, we conclude that Soler's guilty plea was "knowingly and intelligently made" and that the district court did not abuse its discretion in denying Soler's motion to withdraw his guilty plea on those grounds.

We further conclude that Soler's claim of ineffective assistance of counsel – which, as it is presented on direct appeal, we can and do "decide . . . on the record before us," *United States v. Gaskin,* 364 F.3d 438, 468 (2d Cir. 2004) (internal quotation marks and citation omitted), as urged by both parties at oral argument, and which we review *de novo, see United States v. Couto,* 311 F.3d 179, 187 (2d Cir. 2002) – is without merit. Soler contends, *inter alia,* that it was virtually *per se* ineffective assistance for counsel to recommend that he plead guilty to a count that carried a mandatory term of life imprisonment (when he did not face the death penalty), particularly without having secured a cooperation agreement with the government. However, Soler decided to plead guilty only after the trial

had begun and the jury had heard two days of testimony. As Soler was then aware of some of the actual evidence, and as there was a possibility that a plea of guilty at that point might facilitate his negotiating a favorable cooperation agreement, Soler has failed to show that counsel's recommendation fell below an objective standard of reasonableness.

Soler's related contention, as a basis for his ineffective assistance claim, that he was unaware of the consequences – particularly as to the mandatory life sentence – of pleading guilty without an already-secured cooperation agreement is belied by the record. In addition to counsel's statements, during the plea colloquy, that he had spoken with Soler about how sentencing worked, Soler indicated during the colloquy that he understood that: he faced a mandatory life sentence if he pled guilty; he had not entered into a cooperation agreement with the government at the time of the plea; and, even if he did enter into an agreement with the government, there were no guarantees that the government would move for a downward departure pursuant to that agreement nor that the court would grant such a departure and impose a sentence below the statutory minium, *see* 18 U.S.C. § 3553(e).

Finally, we note that "this is [another of] the rare cases where we can determine without remand that the district court's use of the Guidelines as a mandatory regime was harmless error," *United States v. Sharpley*, Nos. 04-2934-CR, 04-2935-CR, 2005 WL 357449, at *3, 399 F.3d 123, 2005 U.S. App. LEXIS 2670, at *10 (2d Cir. Feb. 16, 2005), because Soler was sentenced in accordance with a statutory mandatory minimum of life imprisonment under 18 U.S.C. § 1959(a)(1) – from which "a district court is not authorized to depart . . . unless the Government has

moved for a downward departure," *see United States v. Bruno*, 383 F.3d 65, 92 (2d Cir. 2004) – so that "any reduction in the calculated Guidelines range could not reduce [Soler's] actual sentence," *Sharpley*, 2005 WL 357449, at *3, 2005 U.S. App. LEXIS 2670, at *11. There is no reason to remand to the district court.

We have considered all of Soler's contentions on this appeal and have found them to be without merit. The judgment of the District Court is hereby AFFIRMED.

UNITED STATES OF AMERICA v. ISAIAS SOLER

CRIMINAL CASE NO. 3:00 CR 227 (SRU)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

289 F. Supp. 2d 210; 2003 U.S. Dist. LEXIS 19412

October 30, 2003, Filed

COUNSEL: For Frank Estrada aka: The Terminator, Big Dog, Frankie Estrada Mustard, Defendant: Joseph W. McQuade, Kainen, Escalera & McHale, PC, Hartford, CT USA. Thomas E. Minogue, Jr., Minogue Birnbaum, New Canaan, CT USA.

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For Nelson Carrasquillo, Defendant: Frank J. Riccio, Bridgeport, CT USA.

For William Rodriguez aka: Billy Rodriguez, Billy Gomez, Billy the Kid, William Gomez, Defendant: David A. Moraghan, Smith, Keefe, Moraghan & Waterfall, Torrington, CT USA.

For Eddie Lawhorn aka: Fat Boy, Defendant: Matthew Joseph Collins, Manchester, CT USA.

For Yamarr Shipman aka: Country, Mar, Defendant: Francis L. O'Reilly, O'Reilly & Shaw, Fairfield, CT USA.

For Michael Hilliard aka: Mizzy, Defendant: Auden Groggins, Fairfield, CT USA. Vito A. Castignoli, Milford, CT USA.

For Jermaine Jenkins aka: Fats, Defendant: Joseph J Colarusso, Law Offices of Joseph J. Colarusso, Stamford, CT USA.

For Joseph Butler aka: Pee Wee, Defendant: Michael Moscowitz, Moscowitz, Chapman & King, New Haven, CT USA.

For Gloria Vargas, Defendant: Peter J. Schaffer, PMB # 330, Stamford, CT USA.

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JUDGES: Stefan R. Underhill, United States District Judge.

OPINION BY: Stefan R. Underhill

OPINION:

RULING ON DEFENDANT'S MOTION TO VACATE HIS GUILTY PLEA

Isaias Soler ("Soler") is named as a defendant in nine counts of the Third Superseding Indictment in this case. On January 9, 2002, after approximately three days of trial, Soler pled guilty to all charges against him. *See* Tr. at 2.[1] Included among these counts was a VCAR (Violent Crime in Aid of Racketeering) murder claim (hereinafter also referred to as "Count three"). In the present motion, Soler moves to withdraw his guilty plea, arguing that the plea is invalid because he "involuntarily" entered the plea. More specifically, Soler maintains that he entered his plea involuntarily because both his counsel, Attorney Peter Truebner, and the court failed to sufficiently advise him that the Federal Sentencing Guidelines ("Sentencing Guidelines") mandate an automatic life term of imprisonment for VCAR murder. For the reasons that follow, Soler's motion is denied.

[1] All references to transcripts refer to the transcript of the plea allocution dated January 9, 2002 (Docket # 1125).

I. Background

Prior to accepting Soler's guilty plea, the Government, in open court, described the nature of each count against Soler, as well as the penalties that he faced on each charge. Specifically, Assistant United States Attorney Alex Hernandez described the nature of the charge set forth in Count three and stated that Soler faced a life term of imprisonment if he pled guilty to Count three.

> Count three charges the defendant with committing [a] violent crime in aid of racketeering, specifically murder, in violation of Title 18 United States Code, Section 1959 Subsection A 1. Pursuant to 1959, the defendant is facing a mandatory lifetime term of imprisonment at the time of sentencing. . . .

Tr. at 8.

At the conclusion of the Government's summary of the charges and associated penalties, the court inquired into Soler's understanding of the charges filed against him and in particular, it inquired whether Soler was aware that Count three mandated a life term of imprisonment.

> THE COURT: Mr. Soler, do you understand the nature of each of the charges against you in these nine counts?
>
> THE DEFENDANT: Yes.
>
> . . .
>
> THE COURT: And do you understand that with Count Three that there is a mandatory life imprisonment penalty that applies?
>
> THE DEFENDANT: Yes.

Id. at 10-11.

Thereafter, the court granted Soler a recess to discuss with Attorney Treubner [sic] any potential issues he might have with pleading guilty. *See id.* at 15. At the conclusion of the recess, Attorney Truebner and Soler both represented in open court that Soler, with the understanding that he was facing a life term of imprisonment, wished to continue with the allocution.

> THE COURT: Mr. Truebner, have you and Mr. Soler had sufficient time to talk through your issues?
>
> MR. TRUEBNER: We have, Your Honor, and he wants to continue with his plea of guilty. I think everyone in the courtroom can appreciate how difficult it is for a 22 year old man to plead guilty to a charge carrying a mandatory life sentence, particularly when he believes there are some defenses to that charge, and suddenly he just saw the doors closing on him forever and had some second thoughts about his decision, but I think he's had an opportunity to reconsider and is prepared to continue.
>
> THE COURT: All right. Mr. Soler, is that correct?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right. We were going through the list of rights that you'd be giving up if you plead guilty and I want to be sure you didn't

> have any questions or concerns about anything I've said so far in describing those rights.[2]
>
> THE DEFENDANT: No questions.
>
> THE COURT: All right. You understand everything I've said so far?
>
> THE DEFENDANT: Yes.

Id. at 16-17.

Shortly thereafter, the court asked the parties whether the plea agreement accurately reflected that Count three involved a mandatory life term of imprisonment. Counsel and the defendant acknowledged that Count three included such a term of imprisonment.

> THE COURT: Mr. Hernandez, let me just inquire whether – and Mr. Truebner as well, whether either of you believe that the third count, penalty for the third court [sic] on page two at the top [of the plea agreement letter] should reflect a mandatory lifetime imprisonment? I know we've discussed that in court. Do either of you believe that the plea agreement letter needs to be amended?
>
> MR. HERNANDEZ: I don't think so. I think it says at the top the penalty is lifetime imprisonment. It's not up to lifetime, it's mandatory lifetime imprisonment. We've discussed that with counsel and I believe the defendant and counsel understand that that's what that means.

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[2] Prior to this dialogue, Soler assured the court that he was aware of the constitutional rights he was waiving by pleading guilty, that his mind was clear, and that he was satisfied with counsel's representation. *See* Tr. at 2-6.

> THE COURT: Mr. Truebner?
>
> MR. TRUEBNER: That is correct, Your Honor, and that was a change from a previous draft agreement which had the words "up to life," up to life imprisonment, and now it turns out that the statute makes that mandatory so I think that's understood by all the parties.

Id. at 21.

The court then inquired whether Soler understood the terms and conditions of the plea letter prior to signing it.

> THE COURT: Did you have a chance to read this letter [referring to the plea agreement] before you signed it?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Did you have a chance to talk to Mr. Truebner before you signed it?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Did you understand its terms before you signed it?
>
> THE DEFENDANT: Yes.

Id. at 21-22.

Subsequently, upon the court's instructions, the Government stated, in open court, the significant terms of the plea agreement letter. *See id.* at 22-25. Of particular importance to the present motion, the Government stated that the letter reflected that the Sentencing Guidelines would apply in this case, and that Soler acknowledged that he was entering the guilty plea knowingly and voluntarily, and because he was in fact guilty of each of the offenses charged in the indictment. *See id.* at 24. When

asked if he had anything to add, Attorney Truebner represented to the court Soler's desire to avoid the mandatory minimum life term of imprisonment by cooperating with the Government.[3]

> MR. TRUEBNER: If your Honor please, the defendant through me has had conversations with the government about possible cooperation and how that cooperation, or at least the opportunity to cooperate may be the basis of getting away from the mandatory life sentence. There have been no specific promises, no guarantees or anything else, but I think just so the record is clear, the defendant is certainly aware of that opportunity and intends to pursue it. Whether or not it amounts to anything or helps him at the end of the day, no one can say and no one's made any promises.

Id. at 25-26.

The court then reiterated to the defendant that the Government had made no promises to extend a cooperation agreement and that any future arrangements would be entirely at the Government's discretion.

> THE COURT: On that point, Mr. Soler, I want to just make sure you understand a couple of things. One is that there is no agreement that you be permitted to cooperate in any way and even if at some point in the future an agreement

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[3] Under 18 U.S.C. § 3553(e), a provision of the Sentencing Reform Act, and Federal Sentencing Guideline § 5K1.1 promulgated pursuant thereto, a sentencing court, upon motion of the government, may, in its discretion, impose a sentence below the minimum set forth in the Sentencing Guidelines in consideration of a defendant's substantial assistance in the investigation or prosecution of another person.

> does develop that is put down in writing and signed, typically I think, perhaps always, it is the government's decision whether any information you provide to them is sufficient to cause them to want to make a motion that would give you the relief that you're seeking. And they can always decide not to make the motion and your lawyer can't require them to make the motion and I can't require them to make the motion. That's their decision. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And even if they make the motion, there is no guarantee that the motion would be granted. That's my decision, do you understand that?
>
> THE DEFENDANT: Yes.
>
> . . .
>
> THE COURT: And if you're unhappy, even if all of this comes to pass and you're unhappy at the end of the day with the sentence that you receive, you're not going to be able to go back and withdraw your guilty plea, and you're not going to have any right to appeal your conviction, do you understand that?
>
> THE DEFENDANT: Yes.

Id. at 26-27.

Thereafter, the court described the sentencing process, and in particular, the Sentencing Guidelines and their relationship to the sentencing statutes. At first, Soler admitted that he did not understand generally how the Sentencing Guidelines work. After the court's explanation of the Sentencing Guidelines, however, Soler acknowledged

that he understood how the Sentencing Guidelines worked.

> THE COURT: I also want to be sure that you understand that in the sentencing process, I'm going to be given information about you, about your crimes, about the facts and circumstances that are relevant to sentencing, and any information that comes to me that I find reliable I can rely upon and I can base my sentencing on that information, even if that information comes from you or your family [or] your friends. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And what that means is based upon that information, you may receive a harsher sentence than you expect and even if you do, again, I want to be sure that you understand that you cannot withdraw your guilty plea and you cannot appeal your conviction, you'll be left only with the right to appeal your sentence. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Sentencing in the federal court is governed in two important ways. One is by what we call the sentencing guidelines, and the other is by federal laws, what we call statutes that set forth certain minimums and maximum penalties. I want to be sure that you understand both that there is the sentencing guidelines and how generally how those guidelines operate, and second, that you understand that there may be statutes, laws that trump that I have to follow instead of the guidelines. Do you understand generally how that works?

THE DEFENDANT: No.

THE COURT: Okay. All right, the sentencing guidelines literally are a book of rules that tell me as a judge primarily how I make decisions about two things. One thing is the seriousness of your offense. And those literally are given a number, a rating about how serious the offense, your offense conduct is. And the other factor is your criminal history, how many times you've been convicted, what you were convicted of, whether you were convicted while you were on probation or parole, any number of factors that, again, give a rating of how serious your past criminal history is. Do you understand?

THE DEFENDANT: Yes

THE COURT: All right, and then literally there is a chart at the back of this book and the chart, you go down to the number of the seriousness of your offense and you go across to the level of your criminal history and you'll see in the little box the guideline what's called the guideline range of incarceration. That is the period of time that you are likely to be sentenced to. All right? Do you understand? Have you seen that chart?

THE DEFENDANT: Yes.

Id. at 32-34.

Following the plea allocution, Soler pled guilty to each of the nine counts in which he was charged, and the court accepted his plea. Eighteen months later, Soler filed the present motion. Soler has yet be to be sentenced.

II. Standards of Review of a Motion to Withdraw a Guilty Plea

Motions to withdraw a guilty plea before sentencing are governed by Federal Rule of Criminal Procedure 11(d)(2)(B).[4] Rule 11(d)(2)(B) states that "[a] defendant may withdraw a plea of guilty or nolo contendere . . . after the court accepts the plea, but before it imposes sentence if . . . the defendant can show a fair and just reason for requesting withdrawal." "Although this standard implies that motions to withdraw prior to sentence should be liberally granted, a defendant who seeks to withdraw his plea bears the burden of satisfying the trial judge that there are valid grounds for withdrawal, taking into account any prejudice to the government." *United States v. Gonzalez*, 970 F.2d 1095, 1100 (2d Cir.1992) (internal quotations marks and citations omitted) (referring to former Rule 32(d)). "However, the government need not demonstrate prejudice where the defendant fails to show sufficient grounds to justify withdrawal of the plea." *Id.* (citing *United States v. Torres*, 129 F.3d 710, 715 (2d Cir.1997)).

A defendant who raises a "significant question about the voluntariness of the original plea" has a valid ground

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[4] Before December 1, 2002, Rule 11(d)(2)(B) was found in Rule 32(e). *See United States v. Nostratis*, 321 F.3d 1206, 1208 n.1 (9th Cir. 2003) ("Despite minor language changes in the rule, the 'fair and just reason' standard remains the same" in the new rule.). In addition, before the 1994 amendments, the text of Rule 11(d)(2)(B) appeared in Rule 32(d). *See* Fed. R. Crim. P. 11 Advisory Committee Notes (2002 Amendments); Fed. R. Crim. P. 32 Advisory Committee Notes (1994 Amendments). Thus, although Soler made his motion pursuant to Rule 32(d), the court has treated the motion as one made pursuant to Rule 11(d)(2)(B).

to vacate the plea. *Torres*, 129 F.3d at 715 (citing *United States v. Maher*, 108 F.3d 1513, 1529 (2d Cir. 1997)). A defendant, however, must offer more than "bald statements that simply contradict what he said at his plea allocution" in order to call into doubt the voluntariness of his guilty plea. *See id.* In this case, Soler contends that his plea was involuntary because Attorney Truebner failed to adequately inform him that the Sentencing Guidelines mandate a life term of imprisonment on the VCAR murder claim. In addition, Soler claims that his plea was involuntary because the court, in violation of Federal Rule of Criminal Procedure 11, failed to appropriately inquire into whether Soler understood that the Sentencing Guidelines provide for a mandatory life term of imprisonment on the VCAR murder claim in Count three.

A. *Ineffective Assistance of Counsel*

The court is permitted to vacate a guilty plea if the defendant entered the plea involuntarily as a result of ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 56, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985); *United States v. Couto*, 311 F.3d 179, 182 (2d Cir. 2002). In order to withdraw a guilty plea based on ineffective assistance of counsel, a defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Lockhart*, 474 U.S. at 58, (holding that "the two-part *Strickland v. Washington*, [466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984),] test applies to challenges to guilty pleas based on ineffective assistance of counsel."); *Ventura v. Meachum*, 957 F.2d 1048, 1058 (2d Cir. 1992) (same). Where, as here,

the petitioner's specific claim is that counsel has failed to advise him of the sentence that could result from a plea of guilty, the critical issue in evaluating the ineffective assistance of counsel claim is whether, at the time of his change of plea, "the defendant was aware of the actual sentencing possibilities, and, if not, whether accurate information would have made any difference in his decision to enter a plea." *Ventura*, 957 F.2d at 1058 (internal citations omitted); *see also Hill v. Ternullo*, 510 F.2d 844 (2d Cir. 1975) (noting that counsel's failure to advise his client properly on the maximum or minimum term fixed by statute for an offense may vitiate the guilty plea); *cf. United States ex rel. LaFay v. Fritz*, 455 F.2d 297 (2d Cir. 1972) (noting that an attorney's reasonably mistaken estimate to his client of the sentencing possibilities does not deprive the defendant's subsequent plea of the requisite intelligent and voluntary quality). Thus, even if counsel provides deficient advice, a defendant who understands the actual sentencing possibilities prior to entering the plea cannot succeed on an ineffective assistance of counsel claim because the defendant cannot prove that "but for counsel's unprofessional errors," he would have elected to proceed with the trial instead of pleading guilty. *Id.*; *see also Strickland*, 466 U.S. at 694.

B. *Federal Rule of Criminal Procedure 11*

Among other things, Rule 11 requires the court to ensure that the defendant understands the maximum and minimum penalties he faces by pleading guilty. *See* Fed. R. Crim. P. 11(b)(1)(H-I). "The Second Circuit has adopted a standard of strict adherence to Rule 11." *United States v. Lora*, 895 F.2d 878, 880 (2d Cir. 1990); *United States v. Rossillo*, 853 F.2d 1062 (2d Cir. 1988); *United States v.*

Gonzalez, 820 F.2d 575 (2d Cir. 1987); *United States v. Journet*, 544 F.2d 633 (2d Cir. 1976) (rationalizing the court's strict adherence to Rule 11 because a "guilty plea is the equivalent of a conviction and involves the defendant's waiver of precious constitutional rights") (internal citations and quotations omitted). The court is permitted, therefore, to vacate a guilty plea if the defendant entered a plea involuntarily as a result of the sentencing court's failure to comply with Fed. R. Crim. P. 11. *See United States v. Journet*, 544 F.2d 633 (2d Cir. 1976) (vacating defendant's guilty plea because the district court failed to inform the defendant that the maximum possible sentence included a possible life-time parole.).

III. Discussion

Soler argues that his plea is invalid because he received ineffective assistance of counsel and because the court violated Rule 11. The critical issue in deciding both of these claims is whether, at the time of the allocution, Soler was aware that he faced a life sentence if he pled guilty to the VCAR murder claim. *See Ventura*, 957 F.2d at 1058.

Throughout the allocution, the court went to great lengths to inquire into the defendant's understanding that he faced a term of life imprisonment by pleading guilty to Count three. Soler repeatedly assured the court that he understood the consequences of pleading guilty, and in particular, that he faced a term of life imprisonment on Count three. A review of the record demonstrates that, at the time of the plea allocution, Soler was unequivocally aware that the Sentencing Guidelines mandated a life term of imprisonment for Count three. Accordingly, in the

absence of any credible evidence to the contrary, the court is permitted to rely upon the defendant's sworn statements, made in open court, that: his plea was knowing and voluntary, he understood that Count three required a mandatory term of life imprisonment, he had discussed the plea with his attorney, he knew that he could not withdraw the plea, he knew that no promises had been made except those contained in the plea agreement, and he was satisfied with the advice of counsel. *See Hernandez*, 242 F.3d 110, 113; *Torres*, 129 F.3d at 715 ("A defendant's bald statements that simply contradict what he said at his plea allocution are not sufficient grounds to withdraw the guilty plea."); *see also United States v. DeJesus*, 219 F.3d 117, 121 (2d Cir. 2000) (per curiam) (rejecting the defendant's assertion that he did not knowingly waive his right to appeal in his plea agreement because that contention was inconsistent with his statements during the plea colloquy).

Even if Soler could show that counsel's representation fell below a reasonable standard, a question which I need not reach, the claim of ineffective assistance of counsel must fail because Soler was aware that the Sentencing Guidelines mandated a term of life imprisonment for Count three. Thus, Soler cannot show a reasonable probability that, but for the alleged ineffectiveness, he would have decided to continue with the trial. *See Ventura*, 957 F.2d at 1058.

Similarly, Soler's claim that the court violated Fed. R. Crim. P. 11 is also without merit. On numerous occasions, the court inquired into Soler's understanding of the nature and penalties associated with the charged crimes. The court explained the Sentencing Guidelines to Soler and repeatedly inquired whether he understood that he faced a

term of life imprisonment by pleading guilty to the VCAR murder claim. Soler assured the court that he understood the Sentencing Guidelines and that he was facing a term of life imprisonment. Again, Soler has failed to provide the court with any justification for ignoring the statements he made during the plea allocution that he understood the penalties associated with the VCAR murder claim.

IV. Conclusion.

The record makes clear that Soler decided to plead guilty to Count three with a clear understanding that the Sentencing Guidelines mandate a life sentence for that count of conviction. Accordingly, Soler's motion to withdraw his guilty plea [doc. # 1236] on the ground that he involuntarily entered the plea is DENIED.

It is so ordered.

Dated at Bridgeport, Connecticut, this ___ day of October 2003.

Stefan R. Underhill

United States District Judge